Roma One Enterprises, d/b/a Tony Roma's Restaurant *and* Mauro S. Ruiz. Case 21–CA–31485

June 8, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On July 22, 1997, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed a brief opposing the exceptions, and the General Counsel filed a brief in reply to the Respondent's opposition brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent herewith, and to adopt the recommended Order as modified.

The only exceptions in this case are those filed by the General Counsel concerning the judge's recommended remedy. The judge declined to recommend reinstatement and full backpay for the two discriminatees in this case, Mauro Ruiz and Antonio Gaitan, who the judge found were suspended in violation of Section 8(a)(1). Instead, she concluded that limited backpay was appropriate, based on her view that both of the discriminatees unjustifiably refused work offered by the Respondent and subsequently voluntarily quit their employment. We disagree, concluding on the basis of the present record that the Respondent has not made a specific, unequivocal, and unconditional offer of reinstatement which would properly toll backpay. Accordingly, as explained below, reinstatement and full backpay is the appropriate remedy in this case for the Respondent's unfair labor practices.

Facts

On July 29, 1996,[2] Ruiz and Gaitan, cooks in the Respondent's restaurant, left work early pursuant to their complaints about working conditions. It is undisputed at this stage of the case that the two employees engaged in a strike protected by Section 7. Each of them reported to work for his next scheduled shift, Gaitan on July 30 and Ruiz on July 31.[3] David Marks, general manager of the Respondent's restaurant, informed each when he reported that he was suspended without pay while Marks conducted an investigation of their conduct on July 29.[4]

Marks concluded that there was no legitimate basis for the cooks' July 29 walkout, and on August 1 he issued disciplinary writeups to be placed in their personnel files. The writeups stated, inter alia, that their conduct had been unsatisfactory on July 29 and that any repetition would lead to further discipline or termination. Marks' testimony establishes that, as a matter of policy, the Respondent would not permit the two employees to return to work until they signed the writeups—either at the bottom of the document, indicating acquiescence to the writeup, or in the space reserved for employee comments. After drafting the writeups, Marks began his attempts, unsuccessful at first, to contact the two cooks in order to discuss the documents with them.

In the meantime, on August 2, Ruiz spoke by telephone with Karen Kozen, one of the Respondent's owners. He asked for his work schedule, and Kozen told him to call Marks. Ruiz did not contact Marks.

On August 12, Marks reached Gaitan by telephone, seeking to discuss his disciplinary writeup. He spoke with Gaitan through an interpreter. They talked about his job status: Gaitan thought he had been discharged, but Marks assured him that he had not been. They discussed work hours and scheduling: Marks asked him if he could work that day, and Gaitan said that he could not because it would conflict with the work schedule for his preexisting second job. The conversation resulted in an agreement to meet on August 13 or 14 to discuss Gaitan's employment. This meeting did not take place.

On August 19, Marks met with Gaitan and Ruiz at the restaurant. Marks offered to reinstate them if they would sign the disciplinary writeups. Ruiz and Gaitan expressed interest in returning to work, but requested 2 weeks' backpay. Marks said he had to discuss the backpay question with the Respondent's owners. Neither side contacted the other to follow up this meeting.

On October 25, the Respondent sent certified letters to the two discriminatees, requesting that they ''report to work at Tony Roma's immediately.'' According to Marks, Ruiz' letter was received, but he did not respond. Gaitan's letter was returned to the Respondent undelivered.

The judge concluded that the Respondent's suspension of the two cooks was attributable to their strike activity, and therefore violated Section 8(a)(1). On the question of an appropriate remedy, she found that backpay for Ruiz was tolled as of August 2 because he failed to act on Kozen's instruction to call Marks for his schedule, and that Gaitan's backpay was tolled on August 12 because he refused work offered to him

[1] The Respondent also filed a request for attorneys' fees, which the Board rejected as premature on December 9, 1997. See Sec. 102.148 of the Board's Rules and Regulations.

[2] All dates hereafter are in 1996.

[3] We find that the two cooks unconditionally offered to end their strike and return to work when they reported at these times.

[4] At the hearing, Marks described these suspensions as ''open-ended.''

by Marks on that date. She also found that the two discriminatees effectively quit their employment with the Respondent by failing to follow up on their discussion with Marks on August 19. Accordingly, she recommended limited backpay and no reinstatement.

Discussion

As set forth above, the Respondent unlawfully put Ruiz and Gaitan on ''open ended suspension'' for their protected walkout on July 29. The issue regarding the Respondent's subsequent actions is, therefore, essentially remedial—whether the Respondent made an offer of reinstatement to either discriminatee sufficient to toll backpay. The Board recently restated several legal principles relevant to this question:

> A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional in order to toll backpay. See, e.g., *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992); *L. A. Water Treatment*, 263 NLRB 244, 246 (1982); and *Standard Aggregate Corp.*, 213 NLRB 154 (1974). It is the employer's burden to establish that it made a valid offer of reinstatement to the discriminatees. *L. A. Water*, supra at 246–247. For a reinstatement offer to be valid, it must have sufficient specificity to apprise the discriminatee that the employer is offering unconditional and full reinstatement to the employee's former or a substantially equivalent position. *Standard Aggregate*, supra at 154.

Adsco Mfg. Corp., 322 NLRB 217, 218 (1996). In addition, the Board does not evaluate a discriminatee's reply to a reinstatement offer until the respondent proves that the offer is a valid one, i.e., consistent with the principles above. See, e.g., *CleanSoils, Inc.*, 317 NLRB 99, 110 (1995); *Consolidated Freightways*, 290 NLRB 771, 772–773 (1988), enfd. as modified 892 F.2d 1052 (D.C. Cir. 1989), cert. denied 498 U.S. 817 (1990).

Our review of the evidence establishes that the Respondent never made an offer of reinstatement to Ruiz or Gaitan which would satisfy its burden and require our evaluation of the discriminatees' conduct in response. Specifically, we disagree with the judge that Ruiz' backpay was tolled on August 2: Kozen said nothing to him which constituted an offer of any kind, much less one that was ''specific, unequivocal, and unconditional.'' We also disagree with the judge that Gaitan's backpay was tolled on August 12. Marks' purpose in contacting Gaitan on that day was not to offer reinstatement, but to set up a meeting to discuss his job situation, and in particular, to discuss the requirement that he sign the disciplinary writeup issued August 1.[5] A meeting was arranged, and thus Marks' goal was satisfied. However, an offer to meet to discuss a discriminatee's employment situation is not an offer of reinstatement, and does not toll backpay. See *La Corte ECM, Inc.*, 322 NLRB 137, 140–141 (1996); *Holo-Krome Co.*, 302 NLRB at 454. Marks' offer clearly lacked the requisite specificity.

At his August 19 meeting with Ruiz and Gaitan, Marks explained the terms for reinstatement of the discriminatees that the Respondent had established on August 1: that they sign, for placement in their personnel records, disciplinary writeups which indicated that their strike activity of July 29 constituted unsatisfactory work performance that would lead to further discipline or termination if repeated. Since we are adopting the finding (to which there are no exceptions) that their walkout on July 29 was a protected strike, it was obviously impermissible for the Respondent to condition their reinstatement on their acceptance of a written disciplinary warning for engaging in that conduct. *Cleansoils, Inc.*, supra, 317 NLRB at 111; *Consolidated Freightways*, supra, 290 NLRB at 773; *Rikal West, Inc.*, 274 NLRB 1136 fn. 2, 1138–1139 (1985).[6] Such a condition precludes a finding that the August 19 offer was adequate to toll backpay or that the discriminatees voluntarily quit their employment by failing to respond to it.

Finally, the Respondent's certified letters of October 25 did not clearly remove the condition on reinstatement expressed to the discriminatees on August 19. Therefore, it is reasonable to deduce from the entire factual context that the improper condition remained a part of these offers. On this basis alone, they were insufficient to toll backpay.

Under these circumstances, the Respondent has not shown that it made a valid, unconditional offer of reinstatement to either discriminatee. Therefore, the Board's standard remedial order of reinstatement and full backpay for Ruiz and Gaitan remains appropriate in this case to remedy the Respondent's unfair labor practices, and we will modify the judge's order accordingly.[7]

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[5] We discuss below the significance of this writeup in itself, and the writeup of Ruiz as well.

[6] Disciplinary warnings of this kind are, in fact, commonly found to be independent unfair labor practices. *United Parcel Service*, 301 NLRB 1142, 1144 (1991). See also *Consolidated Freightways*, supra, 290 NLRB at 772 fn. 4. Because the writeups were neither alleged nor litigated in this proceeding as independent violations, however, we do not make a separate formal finding or include them in the cease-and-desist order. We note, however, that the disciplinary writeups are connected to the suspensions found unlawful by the judge, and, therefore, properly are included in the expunction order recommended by the judge as part of the remedy for the unlawful suspensions.

[7] The complaint alleged that the two discriminatees were unlawfully discharged. The judge found that they were unlawfully suspended. See fn. 15 of the judge's decision. The Respondent in fact

Our dissenting colleague's essential disagreement is not with the manner in which we have applied precedent but with the precedent itself. As the cases cited above hold, when an employer has unlawfully laid off an employee, its remedial obligation is to make a specific, unequivocal, and unconditional offer of reinstatement. In other words, we are not requiring ''magic words'': we are simply, consistent with Board and court precedent, requiring words that are specific and unequivocal and that offer reinstatement without conditions attached. In order to find that a sufficient offer of reinstatement was made here, our dissenting colleague applies a less stringent standard.

In suggesting that the Respondent's requirement that Ruiz and Gaitan sign disciplinary writeups was a negligible condition on their reinstatement, our colleague overlooks the reasonable inference that the writeups would have a significant negative impact on these employees in any future disciplinary situation, regardless of any comments they might make on the ''write-up'' form they were required to sign. As we have noted above, evidence that the Respondent insisted on the employees' acknowledgement of a written record of discipline for the very activity for which the Respondent had *unlawfully* suspended them obviously precludes a finding that the reinstatement offer was ''unconditional.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Roma One Enterprises, d/b/a Tony Roma's Restaurant, Carlsbad, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a), insert the following in its place, and reletter the subsequent paragraphs accordingly.

''(a) Within 14 days from the date of this Order, offer Mauro Ruiz and Antonio Gaitan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

''(b) Make Mauro Ruiz and Antonio Gaitan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision, as modified herein.''

2. In newly relettered paragraph 2(c), insert the phrase ''including the disciplinary writeups issued August 1, 1996,'' after the words ''unlawful suspensions.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

Contrary to my colleagues, I agree with the judge that reinstatement was offered to employees Ruiz and Gaitan. Thus, a further offer is unnecessary and backpay was tolled when these two employees declined the offer. In my view, the majority places an unrealistic and overly legalistic template on the events in this case to conclude that a ''specific, unequivocal, and unconditional'' offer of reinstatement was not made and, thus, the employees' failure to return to work did not toll the backpay obligation. The majority makes two analytical errors: first, imposing an overly ritualistic obligation with respect to the words an employer must use in its offer; and second, placing an unreasonably high bar as the test, making employee responses irrelevant. I find that the employer clearly told the employees to come back to work and that the employees clearly did not want to.[1]

The unlawful suspensions occurred on July 30 (Gaitan) and July 31 (Ruiz). The suspensions were open-ended, i.e., Respondent could call the employees back whenever it wished. With respect to Ruiz, Respondent agent Kozen told him on August 2 that there was a work schedule for him and that he should call Respondent agent Marks to get that work schedule. Ruiz failed to follow up on this instruction. The instruction to get his work schedule clearly demonstrated that the suspension was over and that reinstatement was intended. If the suspension had not been over and if reinstatement had not been intended, there would be no point in obtaining the work schedule. Although Respondent did not utter the precise words ''you are offered reinstatement,'' there are no magic words that must be used. Thus, it would be clear to any reasonable person that an offer of reinstatement was implicit in the Respondent's instruction to Ruiz to get the work schedule which had been prepared for him.[2]

With respect to Gaitan, the parties discussed work hours and scheduling on August 12. Indeed, the Respondent offered employment on that very day. Gaitan

made the term of each employee's suspension dependent on their signing the improper writeups. Thus, if they refused to sign, they would remain on indefinite suspension. For remedial purposes, we see no significant difference between a ''discharge,'' as alleged by the General Counsel, and the suspension imposed by the Respondent.

We leave to the compliance stage of this proceeding any remedial issues that might arise in determining the amount of backpay owed by the Respondent to Ruiz and Gaitan.

[1] Contrary to the assertions of my colleagues, I do not seek to overturn precedent. My difference with them is that they have turned that precedent into a ritualistic word game.

[2] In cases where an employee has been discharged or laid off, it may be necessary for the employer to expressly state that reinstatement to the prior job is being offered. However, in cases where, as here, an employee is suspended, it is clear that reinstatement to the prior job is being offered, i.e., the suspension is over.

declined because he was working on another job. The parties agreed to meet further on August 13 or 19. Gaitan did not show up.

In addition, an express offer of reinstatement was made to both employees on August 19. The Respondent offered to reinstate them if they would sign disciplinary writeups. The writeup form does not compel acquiescence to the discipline nor admission of wrongdoing. The employees can write comments in a space provided for same. In addition, I note that the writeups are not alleged to be unlawful.[3] Finally, I note that reinstatement was not achieved because the two employees themselves placed a condition thereon, viz. 2 weeks backpay. In these circumstances, I conclude that Respondent did not place an impermissible condition on reinstatement. The employees were clearly no longer suspended and their failure to return to work was their decision, unimpeded by any unlawful or obstructionist conduct by the Respondent.[4]

Finally, on October 25, the Respondent sent certified letters to the two employees asking that they ''report to work at Tony Roma's immediately.'' Neither employee responded.

The failure to respond to the October 25 letter makes even clearer what had been clear all along. These two employees, for their own reasons, were not interested in working for the Respondent. In sum, because the Respondent repeatedly offered reinstatement, in terms that were increasingly explicit, and the two employees always declined, I would not now reward them with yet another offer of reinstatement and backpay.

[3] Since the writeups are not alleged or found to be unlawful, I would not order them expunged.

[4] My colleagues contend that there is a reasonable inference that a writeup would have a significant impact on an employee in any future disciplinary situation. The contention is in error. First, as noted supra, the writeup itself is not attacked as unlawful. Rather, the issue is whether the ''employee signature'' requirement is a sufficient condition to render invalid the employer's offer. Second, since the signature is not an acquiescence to the discipline or an admission of wrongdoing, it is speculative at best as to whether the signature will be held against the employee in the future.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or otherwise discriminate against any of you for concertedly engaging in a strike because of working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Mauro Ruiz and Antonio Gaitan full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mauro Ruiz and Antonio Gaitan whole for any loss of earnings and other benefits resulting from their suspensions, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions of Mauro Ruiz and Antonio Gaitan, including their disciplinary writeups issued August 1, 1996, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

ROMA ONE ENTERPRISES, D/B/A TONY ROMA'S RESTAURANT

David Mori, Esq. and *Ami Silverman, Esq.*, for the General Counsel.

John Edson, Esq. (Luce, Fornard, Hamilton & Scripps), and *James Kozen*, of Roma One Enterprises, for Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in San Diego, California, on June 22 and 23, 1997, pursuant to complaint issued January 27, 1997, alleging that Roma One Enterprises d/b/a Tony Roma's Restaurant (Respondent) violated Section 8(a)(1) of the Act by discharging two cooks, Mauro S. Ruiz and Antonio Gaitan, because they concertedly complained regarding an inoperable ventilation fan. The underlying charge was filed by Ruiz on August 6, 1996.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the oral arguments of counsel for the General Counsel and for Respondent, I make the following

[1] All dates are in 1996 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the restaurant business, annually deriving gross revenues in excess of $500,000 and purchasing and receiving products, goods and materials valued in excess of $10,000 directly from sources within the State of California, which sources purchase and receive products, goods and materials valued in excess of $10,000 directly from points outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Respondent operates a restaurant in Carlsbad, California, which specializes in barbecued ribs and chicken. These specialties are prepared in Respondent's kitchen utilizing an oven, a fryer, and two grills. The kitchen is typically hot due to heat from the oven, fryer, and grills and noisy due to exhaust fans. On Monday, July 29, 1996, undisputedly a very hot day in Carlsbad, California, one of the two exhaust fans in Respondent's kitchen, the exhaust fan located over the large grill, malfunctioned. The other exhaust fan, located over an adjacent small grill, remained in operation.

David Marks, the general manager of the facility, was informed of the malfunction when he arrived that morning. The contractor for repair of the exhaust fans was on the premises and told Marks he could not repair the fan for about a week because it would take that long to obtain the part necessary for the repair. Marks then contacted another repair source who promised and, in fact, did repair the fan the following day. Marks was in and out of the kitchen during that day and noticed it was hotter than normal but he received no complaints from the two day-shift cooks, Santos Ramero and Sergio Lopez, about excessive smoke and did not notice excessive smoke himself.

Sheila Myers, assistant manager, reported to work around 2 p.m. Prior to leaving the restaurant at the end of his schedule, Marks informed Myers that the exhaust fan over the large grill was not working.

Cook Antonio Gaitan reported to work on Monday, July 29, at 4:46 p.m. Cook Mauro Ruiz reported shortly before Gaitan arrived. They relieved Ramero and Lopez. According to Gaitan, not only was the kitchen extremely hot, but there was also so much smoke in the kitchen that by around 6:30 p.m., he began to feel nauseous, his eyes began tearing, and he had difficulty breathing. According to Gaitan, he spoke with Ruiz who stated that he also felt sick.[2] It was agreed that Ruiz, who spoke English, would speak to Assistant Manager Sheila Myers.

Myers recalled that Ruiz spoke to her at about 6:15 p.m. and stated that it was getting busy and it was getting real smoky in the kitchen. Myers did not respond because she was busy assisting with food service. Myers was in and out of the kitchen for the next half hour but nothing further was mentioned by Ruiz about the smoke. Myers noticed that when a large quantity of food was placed on the large grill due to seven tables arriving at once, the smoke rose to the top of the ceiling above the large grill and then, ''floated over across . . . toward the next exhaust.'' At about 6:45 p.m., Ruiz told Myers that, ''he could not work here anymore in this mess, and it was too smoky and that he was going to leave.''[3] Myers asked Ruiz to wait until she could call a replacement for him and he agreed.

Myers then called Marks and left a message on his answering machine stating that she would need some help because one of the cooks was going to leave. Myers next called Sergio Lopez, who had already worked the day shift. He agreed to come back to work. However, Lopez was not strong enough to handle the heavier work. Myers attempted to reach Relief Manager Ken Best but was unsuccessful and then she called Karen Kozen, one of the owners, and told her that one of the cooks was going to be leaving because one of the exhaust fans was broken and it was smoky in the restaurant. Myers told Kozen she needed some help. Kozen stated she would try to get some help for Myers and called back later to say that she was on her way to the restaurant to help. At about 7:10 p.m., Lopez arrived and Ruiz left.

After Ruiz left, Gaitan approached Myers and stated in broken English that he was sorry but he was leaving too. Myers told him, ''okay.'' Myers, who was 2 months pregnant at the time, worked in the kitchen after Gaitan left. Myers did not observe more smoke than usual in the kitchen. She and Lopez both testified that the kitchen was extremely hot but they did not feel nauseous, their eyes did not tear, and they had no difficulty breathing. Kozen arrived at the restaurant a short time later with two fans to relieve the heat. She did not observe unusual smoke in the kitchen. Myers told Kozen that the cooks had left because of the exhaust fan and smoke in the kitchen. Kozen opened the back door and the door connecting the kitchen to the dining area in order to provide further circulation of the air. She also noticed that the repairman had left the roof hatch open which was letting in hot air so she closed that hatch.

Kozen then took over for Myers at the large grill. She estimated that she prepared about 50 to 60 orders during the time she spent in the kitchen. Kozen explained that there was never any smoke in her face because the smoke rises directly from the grill and she was standing in front of the grill. That evening, after the smoke rose over the large grill, it drifted over to the exhaust fan above the small grill. The small grill is adjacent to the large grill. Kozen said she never had smoke in her lungs and her eyes did not water. At about 8 p.m., the large grill was turned off because there were fewer orders. According to Lopez, this was done to relieve heat and to clear smoke from the kitchen.

At about 8:30 p.m., Marks arrived at the restaurant in response to Myers' message on his answering machine. He asked Myers what had happened. Myers stated that Ruiz told her he could not work in the conditions and was leaving.

[2] This testimony was admitted to show it was said but not to prove the truth of the matters asserted therein.

[3] I do not credit Gaitan's testimony that Ruiz, who spoke to Myers in English, told Myers that, ''we were not feeling well, there was too much smoke in the kitchen,'' and asked Myers to quit taking orders. Not only is Gaitan's testimony suspect because he does not speak English fluently, but it also improbable that he could have heard their conversation from a distance of 6 feet in the extremely noisy kitchen.

Myers further related that several minutes later, Gaitan approached and said he was leaving too. Marks attempted to contact Ruiz and Gaitan several times that evening but was unsuccessful.

Gaitan was scheduled to work on the following day. When he reported to work, Marks told Gaitan (using Santos Ramero as interpreter) to take the day off (without pay) because Marks had already scheduled another employee to work for Gaitan. Marks explained that he understood that Gaitan was not coming back.[4] Marks further told Gaitan that he was not scheduled to work again until Marks completed an investigation of the events of the prior evening. Ruiz was scheduled to work 2 days later and Marks told Ruiz the same thing, that he wanted to investigate the situation before scheduling Ruiz again. Marks conducted his investigation and concluded that the cooks had no basis to walk out.[5]

On August 1, Marks completed a counseling form for Ruiz noting unsatisfactory work performance and violation of rule or company policy by leaving his position on July 29 without management approval. The form noted that if the behavior was repeated it would lead to possible counseling notice or immediate termination: ''Walking off the job is considered voluntary job loss.'' Gaitan's notice was similar and stated that employees must discuss the reason for leaving work with the manager on duty. Thereafter, Marks attempted to reach Ruiz and Gaitan to discuss the counseling forms. However, he did not reach either of them. On August 2, Kozen spoke with Ruiz at about 10 a.m. Ruiz asked Kozen for his schedule. Kozen asked Ruiz why he had not called for his schedule earlier. Ruiz said he wanted his schedule now. Kozen told Ruiz that there was a schedule for him but he had to call Marks to get it.[6] Ruiz stated that he would do so. However, Ruiz did not contact Marks.

On August 6, Ruiz filed the unfair labor practice charge in this case alleging that he and Gaitan were discharged because they concertedly complained about unhealthy working conditions. According to Marks, Respondent received notice of the charge before 11:30 a.m. on August 12.

On August 12 at about 11:30 a.m., Marks called Gaitan. Sergio Lopez spoke in Spanish for Marks and asked, ''Hey, what's wrong with you.'' Gaitan responded that nothing was wrong. Marks then asked what kind of game are you and Ruiz playing. Gaitan responded that Marks had fired them. Marks said, ''Your job is here,'' and Gaitan again repeated that Marks had already fired them. Marks then said, ''No, I have never fired you.'' Marks then asked what time Gaitan could come to work and Gaitan responded that he could no longer go to work at Respondent's because his schedule at his other job had changed and conflicted with the hours at Respondent.[7] Gaitan agreed to meet with Marks on August 13 or 14. However, the meeting did not take place.[8]

On August 19, Gaitan, Ruiz, and Ruiz' sister met with Marks at the restaurant. It is undisputed that Marks told the employees that they had not been fired and that they had jobs at the restaurant. Marks told the employees they would need to sign the counseling forms. It is also undisputed that Gaitan and Ruiz agreed to return to work if Marks paid 2 weeks backpay. Marks said he was not authorized to pay backpay and would speak to the owners. Ruiz agreed to call Marks 2 days later to find out about backpay. Neither Ruiz nor Gaitan called back to find out what the decision was and Marks did not attempt to reach them.[9]

Ruiz did not appear at the hearing. Counsel for the General Counsel requested that I find Ruiz unavailable within the meaning of Federal Rule of Evidence 804(a)(5) and admit Ruiz' affidavit pursuant to Rule 804(b)(5). Rule 804 provides in relevant part,

> (a) Definition of unavailability.—''Unavailability as a witness'' includes situations in which the declarant . . . (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.
>
> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (5) Other exceptions.—A statement not specifically covered by one of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his

[4] According to Gaitan, Marks said in Spanish, ''No mas amigo,'' meaning, ''No more my friend,'' and then said in English, ''you don't clean, you don't work, you quit.'' During the course of the conversation, Gaitan testified that Marks repeated these phrases four times. I do not credit this testimony. Gaitan admitted that Marks had never spoken to him in Spanish prior to this time. Marks agreed that he never conversed with Gaitan in Spanish. I credit Marks' testimony in this regard.

[5] Marks spoke with a server, David Manning, who was in and out of the kitchen. Manning reported that there was more smoke in the kitchen than usual but it was fine to work in there. Manning and the other servers did not indicate that they felt sick. Marks spoke with Edmundo Perez, the dish washer, who told him that he did not observe Ruiz or Gaitan appearing sick and Perez, who worked in the same area, did not feel sick. Sergio Lopez, cook, told Marks there was a little more smoke than normal but there was no reason to be alarmed. Lopez worked an 8-hour shift and came back that night when Ruiz asked to leave.

[6] Kozen did not have access to the schedule because she was not at the Carlsbad restaurant at the time of the conversation.

[7] Although Gaitan did not indicate to Marks that this was a temporary change, he testified that the change in his schedule was for 1 week only.

[8] The factual recitation regarding this conversation comports with both Gaitan's and Marks' testimony although Marks did not recall specifically saying, ''What kind of game are you and Ruiz playing,'' but agreed he might have said that.

[9] This description of the conversation is based on Marks' credible testimony. I do not credit Gaitan's version of the conversation which differs slightly. Gaitan testified regarding what Ruiz' sister told him was said. Ruiz' sister did not testify. Under these circumstances, I find Gaitan's testimony potentially unreliable. Marks' demeanor was forthright and open and for these reasons, I credit his version of the conversation.

intention to offer the statement and the particulars of it, including the name and address of the declarant.

Counsel for the General Counsel represented that Ruiz returned to Mexico on October 8, 1996, and that Ruiz was subpoenaed at his current address in Mexico City. Although counsel asserted that letters were sent to the American Embassy in Mexico City to assist Ruiz in obtaining a visa in order to enter the United States to testify in this proceeding, Ruiz asserted in a letter to counsel dated June 20, 1997, that on July 11, 1997,[10] he attempted to obtain a visa but did not have the ''information'' necessary to obtain a visa and his request was refused. On the other hand, counsel for the General Counsel asserted that the American Embassy explained to him that Ruiz was not eligible for a visa because he had no steady employment in Mexico and because his family lives in San Diego; i.e., there would be no reason to return to Mexico after testifying. Counsel for the General Counsel asserted that because further time would not alter the situation, no postponement was sought. Counsel for the General Counsel further asserted that the ''particulars'' of the affidavit were made known to Respondent through investigation of the charge. No advance notice was given to Respondent of intention to utilize Ruiz' affidavit.

Respondent objected to introduction of Ruiz' affidavit because it deprived Respondent of the opportunity to cross examine Ruiz, no advance notice of intent to offer the affidavit was provided, and the ''particulars'' of the affidavit were not made known to Respondent. Moreover, Respondent argued that Ruiz was not unavailable within the meaning of the rule because the evidence did not indicate a serious effort to obtain a visa.

I held that Ruiz was not unavailable and that even if he were unavailable within the meaning of Rule 804, his affidavit was inadmissible pursuant to Rule 804(b)(5) because no advance notice was provided Respondent, Respondent was not made aware of the ''particulars'' of the affidavit, and the affidavit lacked the equivalent circumstantial guarantee of trustworthiness inherent in prior testimony in court or prior deposition testimony. I adhere to this ruling. See, e.g., *Burlingame Saab*, 296 NLRB 227, 233 fn. 7 (1989) (witness who was on vacation in Mexico not unavailable within the meaning of Rule 804); *Town & Country Nursing Home*, 291 NLRB 74, 76 fn. 7 (1988) (failure to expeditiously ascertain current address of crucial witness in order to serve affidavit when it became available shortly before hearing resulted in failure to find the witness but did not constitute ''unavailability'' of the witness).

B. *Analysis*

Section 8(a)(1) of the Act specifically prohibits discharge or discrimination against employees because of their protected, concerted activity. Both the General Counsel and Respondent rely on the definition of concerted activity set forth in *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988),[11] as follows: ''In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.''[12]

In order to establish such discrimination, the General Counsel must show that the employees engaged in concerted activity, Respondent knew that the employees engaged in concerted activity, the concerted activity was protected by the Act, and the discharges were motivated by the employees' protected concerted activity. *Meyers II*, 281 NLRB at 882; *Meyers I*, 268 NLRB at 497. An inference of unlawful motivation may be drawn from the timing of the discharge or other discrimination as well as evidence of animus against the exercise of the protected concerted activity or shifting or false reasons for the action taken. Respondent may then show that it would have discharged or taken other action even in the absence of the protected concerted activities. See *KNTV, Inc.*, 319 NLRB 447, 452 (1995). A one-time concerted refusal to work due to unsafe working conditions, such as alleged in this case, generally constitutes protected activity.[13]

It is undisputed that Gaitan and Ruiz acted in concert. Moreover, it is clear that Respondent assumed the employees were acting together. Both Kozen and Marks agreed that they were told that the cooks had left due to the broken exhaust fan and smoke. This one-time, nonrecurring concerted refusal to work is protected even though other employees might not agree that the working conditions were unsafe. See, e.g., *Sawyer of Napa*, 300 NLRB 131, 137 (1990) (concerted refusal to work mandatory overtime did not lose protection of the Act because the refusal was nonrecurring); *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995) (erroneous belief regarding paid time off did not remove concerted actions from protection of the Act).

I conclude that Ruiz and Gaitan went on strike on the evening of July 29. Gaitan returned to work his normal shift on Tuesday, July 30, and Ruiz returned to work his normal shift on Wednesday, July 31. Both employees were told by Marks that he had covered their shifts because he understood they were not returning. Assuming that both Ruiz and Gaitan made unconditional offers to return to work by appearing at their next scheduled shift, it would have been lawful for Respondent to have covered their shifts for the specific days when they were next scheduled to work.[14] However, Marks also suspended both employees pending investigation of their walkout. This constituted an unlawful suspension attributable only to the employees' strike.[15]

[10] This was obviously an error in the name of the month rather than the year as Ruiz was working for Respondent on July 11, 1996. The subpoena is dated June 4, 1997, and an inference may be drawn that June 11, 1997, was the correct date.

[11] *Myers II* reaffirmed the definition of concerted activity contained in *Myers I*, 268 NLRB 493 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir.), cert. denied 474 U.S. 971 (1985).

[12] See also, *Pacific Electricord Co. v. NLRB*, 361 F.2d 310 (9th Cir. 1966), enfg. 153 NLRB 521 (1965), cited in *KNTV, Inc.*, 319 NLRB 447, 450 (1995).

[13] See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *P & L Cedar Products*, 224 NLRB 244 (1976); *Anheuser-Busch, Inc.*, 239 NLRB 207 (1975).

[14] See, e.g., *Sonoma Mission Inn & Spa*, 322 NLRB 898, 900 (1997), and cases cited therein: *National Car Rental System*, 237 NLRB 172 (1978); *Drug Package Co.*, 228 NLRB 108, 113–114 (1977); *Snowshoe Co.*, 217 NLRB 1056 (1975).

[15] The suspensions were not alleged in the complaint to violate Sec. 8(a)(1). However, the issue of Respondent's motivation in sus-

Continued

CONCLUSION OF LAW

By suspending Mauro Ruiz and Antonio Gaitan, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having discriminatorily suspended employees, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis, for the period of their suspensions, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On August 2, Ruiz was told to call Marks for his hours. He did not do so. On August 12, Gaitan refused work offered to him by Marks but promised to meet with Marks in the next days to discuss the matter. Gaitan did not appear for this discussion. On August 19, Ruiz and Gaitan were told that they had not been fired, their services were required, and they needed to sign an employee counseling form regarding the events of July 29. They responded that they would come back if the Respondent paid 2 weeks backpay. Although Marks agreed to look into the matter, neither Ruiz nor Gaitan called him, as they said they would, to discuss backpay any further. Under these circumstances, I find that Ruiz and Gaitan voluntarily quit and are not entitled to a remedy of reinstatement.[16] I further find that Ruiz is entitled to backpay for unlawful suspension from July 31 (the day he offered to return to work) until August 2 (the day he was told he was scheduled to work). I find that Gaitan is entitled to backpay for unlawful suspension from July 30 (the day he offered to return to work) until August 12 (the day he was told he was scheduled to work).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Roma One Enterprises d/b/a Tony Roma's Restaurant, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending its employees for engaging in activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Mauro Ruiz and Antonio Gaitan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and notify the employees in writing that this has been done and that the suspensions will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in San Diego, California, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 6, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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pending the employees was fully litigated. See, *First Western Building Services*, 309 NLRB 591, 608 (1992); *Sawyer of Napa*, 300 NLRB 131, 137 fn. 16 (1990).

[16] Although Ruiz and Gaitan were unlawfully suspended, this did not excuse their failure to return to work when they were next scheduled to work. See, *KRI Constructors*, 290 NLRB 802, 813–814 (1988) (mere existence of discrimination is insufficient to warrant abandonment of employment).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''